No. 85-6756

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Brief of Amici Curiae State of California, by John K. Van de Kamp, Attorney General, and County of Los Angeles, by Ira Reiner, District Attorney, In Support of Respondent

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Amici curiae, the State of California by John K. Van de Kamp, Attorney General, and the County of Los Angeles, a political subdivision of the State of California by Ira Reiner, District Attorney submit this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

John K. Van De Kamp, Attorney General for the State of California and Ira Reiner, District Attorney for the County of Los Angeles, State of California, jointly represent the People of the State of California in the case of In re Earl Lloyd Jackson, Crim. 22165, pending before the California Supreme Court on petition for writ of habeas corpus. Said case is pending before a referee appointed by the California Supreme Court to take evidence on three issues, one of which is

highly pertinent to the instant case: Whether "death sentences in California have been discriminatorily imposed on the basis of (1) the race of the victim; (2) the race of the defendant; and/or (3) the gender of the defendant."[1/] Amici curiae have been litigating just the discovery aspect of this case for over two years. This order for a reference hearing was granted on the basis of a statistical analysis of limited data on death and life-without-possibility-of-parole (LWOPP) cases. It is the theory of the defense in Jackson that a statistical analysis of death and LWOPP cases will show that persons who kill white victims,

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1. All of the factual representations made in this brief are based upon matters set forth in the record as well as the personal experiences of the government attorneys who have litigated, before the California Supreme Court and its appointed referee, the petition for writ of habeas corpus in the Jackson case.

and male, black defendants are more likely to be charged with and to receive the death penalty because of these unconstitutional racial/gender factors than are persons in other racial/gender categories.

Defendant Jackson, who is black, was charged with murdering two elderly white women in two separate burglaries of their residences in August and September 1977.[2/] These charges made him eligible for the death penalty pursuant to California Penal Code section 190 et seq.[3/] After a jury

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2. The race of defendant Jackson as well as the race of his two victims are not alleged or referred to in the information.

3. The law under which Jackson was convicted and sentenced (Stats. 1977, Ch. 316), enacted August 11, 1977, requires that one or more "special circumstances" be alleged and found true by the trier of fact before capital punishment may be imposed. This law was repealed, and essentially reenacted as modified, by the "Briggs Initiative", passed by the voters and effective November 7, 1978, principally to expand the number of special circumstances making a person eligible for capital punishment.

verdict finding him guilty as charged and imposing the death penalty, a judgment was rendered in March 1979, sentencing him to death. On his automatic appeal to the California Supreme Court, the judgment was affirmed and a concurrent petition for writ of habeas corpus was denied. People v. Jackson (1980) 28 Cal.3d 264. The law under which defendant Jackson was sentenced has been held constitutional on its face by this Court and the California Supreme Court. Pulley v. Harris, 465 U.S. 37 (1984); People v. Frierson, 25 Cal.3d 142, 172-195 (1979).

Defendant Jackson filed a subsequent petition for writ of habeas corpus, which is the basis for a reference hearing ordered by the California Supreme Court. That court first ordered a reference hearing to address two unrelated issues.

Defendant Jackson then moved to expand the reference hearing on the theory that a statistical analysis of capital case data showed evidence of race and gender discrimination in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

In support of his application, he offered inter alia the declaration of Dr. James Cole, Ph.D., a statistician, who analyzed race and gender homicide data published annually by the Bureau of Criminal Statistics (BCS), a division of the State Attorney General's office, and data supplied by the State Public Defender's Office. Using a total of three variables (victim race, defendant race, defendant sex) for all state-wide homicides, all state-wide robbery murders, and all robbery-murders in Los Angeles County, in various combinations of what is

principally a cross tabulation analysis, Dr. Cole concluded, without reference to other circumstances of any cases, that killers of white victims are five times more likely to receive the death penalty than killers of non-white victims. Similar high proportions were found for Black and male defendants when compared to other groups.

On this basis, the reference hearing was ordered expanded to address the issue of whether death sentences in California have been discriminatorily imposed on the basis of race of victim, race of defendant, or gender of defendant.

Since a principal issue in the instant case is whether petitioner Hitchcock is entitled to a hearing on virtually the same issues, based on his presentation of three general statistical studies of Florida capital cases, amici

curiae have concluded that the outcome of the instant case will have a substantial impact upon the administration of criminal justice, and the death penalty law in particular, throughout California. Amici's experience in the Jackson case has made us familiar with the nature of the discrimination issues and the arguments offered by petitioner in this case. Further, amici's experience in complying with court-ordered discovery of a virtual mountain of statewide California homicide data, as well as an assessment of the quality of that data, may prove to be of value to this Court in deciding whether petitioner Hitchcock should be permitted to proceed with a hearing in the District Court as he requests.

SUMMARY OF ARGUMENT

The District Court properly denied petitioner's request for a hearing on his

generalized claim that Florida's capital-sentencing system is applied in an arbitrary, capricious and irrational manner. Petitioner was not entitled to a hearing on this claim. He neither asserted a deprivation of a constitutional right nor alleged facts which would establish one. Petitioner offered only unsupported and contradicted statistical conclusions of disparate impact of the death penalty in Florida. His claim and his showing were inadequate as a matter of law.

When a state imposes its death penalty under a constitutional system which by its very design minimizes any risk of arbitrariness, generalized claims of arbitrariness in the imposition of that state's death penalty should be foreclosed. Only a particularized and factually supported claim of purposeful invidious discrimination in the imposition of

petitioner's own death sentence should have entitled petitioner to a hearing.

The effect of entertaining generalized attacks on a facially constitutional capital-sentencing system is to undo the last ten years of judicial effort to fashion standards for a constitutional death penalty. It is also to undo the last ten years of legislative effort to respond to those standards. A state which has successfully endeavored to institute a constitutional capital-sentencing system should not be required to repeatedly defend that system against generalized claims of arbitrariness and the accompanying related barrages of onerous discovery requests.

Finally, granting such a hearing will lead to a costly and time-consuming data gathering process which will not result in

either reliable data or a reasonable chance of success by petitioner.

ARGUMENT

I

THE GRANTING OF AN EVIDENTIARY HEARING AS REQUESTED BY PETITIONER WILL LEAD TO DISCOVERY WHICH WILL BE COSTLY, WILL UNNECESSARILY DELAY PROCEEDINGS, AND WHICH CANNOT PROVE THAT RACE WAS A FACTOR OPERATING IN THE PARTICULAR CASE UNDER REVIEW

The issue in the instant case includes whether the District Court erred in denying petitioner an evidentiary hearing to consider whether Florida's death penalty law is being unconstitutionally applied on the basis of race of victim and gender of defendant. In the Jackson case, supra, the California Supreme Court has already decided to grant such a hearing. What follows is a description of the discovery process which has occurred thus far in Jackson. This discovery process is itself a strong

reason for upholding the District Court's decision not to grant a hearing in Hitchcock.

A. Data Gathering Is Essential to a Statistical Challenge to the Death Penalty

Data gathering must take place before a statistical challenge to the death penalty can be mounted. Thus, the fact that the law of discovery in California is not precisely parallel to the federal law of discovery (compare: Rule 16, Fed. Rules of Crim. Proc.; United States v. Conder, 423 F.2d 904, 909-911 (6th Cir. 1970); Pitchess v. Superior Court, 11 Cal.3d 531 (1974); Griffin v. Municipal Court, 20 Cal.3d 300 (1977), is unimportant. Moreover, the fact that data may be gathered in advance of a particular case, not pursuant to court order, is not significant. Regardless of who gathers the data, it will be expensive and time-consuming.

Further, it may result in substantial delay of the proceedings, and the data collected through this process will be neither complete nor accurate in terms of a full and fair description of the cases from which the data is derived.

B. Problems of Discovery in Jackson

Defendant Jackson moved for discovery of homicide data throughout the state. This proved to be a motion to <u>compel</u> the <u>People</u> to provide a mountain of homicide data from throughout the state, notwithstanding that much of the data is a matter of public record and equally available to the defendant and his lawyers.

Jackson requested the People provide the defendant's name, case number, age, race and gender, and the victim's age, race and gender in each of four broad categories of homicide cases, from

August 11, 1977 to the present. This was evidently designed to separate all cases in which special circumstances were alleged in the indictment or information from similar cases in which no special circumstances were alleged. A substantial body of other data and information, some of it readily available to the defendant and his attorneys without the use of subpoenas, was also requested.

Although the data was not located in any single county or other location, and although the District Attorney of Los Angeles County has no jurisdiction or control over most of the data nor a legal duty to maintain such data, over the People's objection the referee ordered the People "through the District Attorney of Los Angeles County" to provide defendant with homicide data from throughout the state in each of four broad categories, as

well as other data.[4/]

Specific data requested by Jackson on race of defendant and victim was not

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4. The order, as amended, describes the data as follows:

> "(a) The defendant's name, case number and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which any special circumstance was alleged, and which resulted in at least one conviction of murder in the first or second degree or manslaughter.
>
> "(b) The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in (1) conviction for murder in the first or second degree or manslaughter, and (2) a conviction for any felony enumerated in Penal Code section 190.2, subdivision (a)(17). . . .
>
> "(c)(1) The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in at least one conviction for first degree murder and at least one other conviction for at

ordered provided subject to a subsequent request by the defendant. In addition, the District Attorney of Los Angeles County was ordered to provide a complete set of its own Special Circumstance (capital eligible) case files, comprising some 900 plus cases in which special circumstances were initially alleged in the indictment or information. Also ordered provided were copies of each of the computer tapes produced and maintained by (BCS) as well as any surveys, reports, or compilations of data concerning

information on capital eligible cases

> least second degree murder; and
> "(2) The defendant's name, case number, and county of venue of each homicide prosecution occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in the first degree murder conviction of a defendant who had previously been convicted of a first degree or second degree murder."

which may be or will be prepared by or for the District Attorney or the California Attorney General.

Since most of the homicide data was outside Los Angeles County, and since only the Clerk of the Superior Court of each county is required by law to maintain such information, immediately following the referee's first order of June 26, 1985, the People sent letters to the Clerks of the Superior Court in each of California's 58 counties, asking whether such information was available, how much time it would take to obtain it, and what the estimated cost of such effort would be.[5/] The responses were virtually unanimous in

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5. The People considered using District Attorneys' offices throughout the state as a source of data. However, this was unworkable, since District Attorneys are not required by law to maintain such data and do not generally maintain such data in readily retrievable form, if at all.

indicating that the data was not on computers, was not readily available, that a hand search of hundreds if not thousands of individual court files would be required in most of California's counties, and that the process would be laborious, time-consuming and expensive. The Clerk's responses are best exemplified by the Los Angeles County Clerk's response:

> "Justice Jefferson's [the referee] discovery order is unprecedented in its scope and, based on the volume of cases to be made available to the petitioner, constitutes an extraordinary request which exceeds our legal duties to provide cases files for review. Staff is not provided in our current budget allocation to pull the large number of files involved and perform whatever other tasks may be required. To avoid disrupting the normal flow of court business and case processing, staff will be required to work overtime.
>
> "Also, it is important to note that our record maintenance systems were never designed to respond to this type of request and, therefore, the identification and pulling of these files will be a tedious, manual process. This order appears to require the performance

of tasks beyond our legally mandated duties to maintain cases files and related indices of those files."

Thus, although computers are used in some Clerks' offices in this state, that did not make this an easy task. Some Clerks' offices do not yet use computers. Of those that do, such as Los Angeles County, the computers are not and cannot be programmed to enable these specific bits of information to be retrieved. Indeed, not one Clerk's office in this state maintains the data sought by defendant Jackson, particularly data on race of victim and defendant, in readily retrievable form because there has never been a need for such data.

As a consequence of this near total absence of readily available data, it was anticipated that each Clerk's Office would check the register of actions and make a list of all homicide cases after which the

file for each case would be separately reviewed to determine whether the case fell within one of the four categories.

A hand search of thousands of individual files to determine what the original charges were, when the offenses occurred, whether special circumstances were alleged, and what the outcome of the case was, is no small task. For example, the official superior court file in the Jackson cases consists of two files, each approximately two inches thick. To obtain the desired data, a clerk must find the information or indictment and any amendments thereto, all the verdict forms, and any documents which show the defendant's prior record. Assuming the clerk is familiar with the California Penal Code, the Clerk can then read these documents to obtain the desired information.

In an effort to persuade the referee that the order of discovery was not only contrary to law but very costly and difficult to comply with, the People filed a Motion for Reconsideration. The referee, however, denied this motion and ordered discovery to proceed on January 10, 1986. The People then sought review of this order by the California Supreme Court but also commenced the process of obtaining the data. The process began with the People serving subpoenas duces tecum upon the Clerk of the Superior Court of each of California's 58 counties, requesting four lists of cases, exactly as described in the order of discovery. In order to do this, each clerk was served with a subpoena duces tecum and a cover letter, explaining the nature of the request.

Shortly after this was done, however, the referee issued a new discovery order changing one paragraph of his earlier order and the California Supreme Court followed this by denying the People's request to quash the referee's order, but modified that order by changing yet another paragraph. This necessitated a second complete set of subpoenas duces tecum being served upon the Clerks, each with a new cover letter explaining the changes.

Many Clerks' offices had acted to comply with the first subpoena duces tecum. Thus, when the second subpoena duces tecum was served upon them, requesting somewhat different data, a second intensive effort was required to comply with the subpoena.

To assist the Clerks in identifying these cases, relevant albeit incomplete data was also subpoenaed from the

Administrative Office of the Courts and the State Public Defender. This data, together with additional data obtained without subpoena from the State Department of Corrections, was provided to the Clerks. However, the process of obtaining even this limited data was time-consuming and, thus, was only marginally helpful to the Clerks.

Almost all of the Clerk's Offices had difficulty understanding the nature of this complicated request for data. Many letters and long-distance telephone calls were necessary to answer questions by the Clerks. Indeed, some Clerks' Offices never completely understood the subpoenas and, thus, required virtual total guidance by lawyers from the Attorney General's and the District Attorney's Offices to obtain the data. This task of obtaining the data from Clerks kept two government lawyers

busy almost full-time for six months; two additional lawyers also occasionally assisted in this effort.

As a consequence of the large volume and complicated nature of the data sought, a substantial portion of Clerks' responses were incomplete, in error, or both. Many responses had to be returned because they were obviously incomplete and in error. Even now, after six months of effort by government attorneys to obtain this limited data, it appears that significant portions of the data are subject to substantial error.

Los Angeles County itself is the best example. The Los Angeles County Clerk's Office is the largest clerk's office in the state, with approximately 2,060 employees, whose duties included handling in excess of 32,000 felony filings in 1985 alone. Although this Office relies

heavily upon computers to accomplish its assigned tasks, the computers could not be used to produce the data requested. The Clerk's Office responded to our second subpoena duces tecum with 130 pages of materials, covering approximately 750 cases, and including several copies of Informations verbatim because the clerks could not understand them. Subsequently, when a problem arose as a result of comparing this data with another compilation of data, the People found it necessary to check the accuracy of the Clerk's data. A government lawyer spent approximately two weeks checking each of 250 case files and found the data is subject to a 50% plus error rate. It was later determined that the Clerk's Office tried to circumvent the necessity of checking every individual case file by relying only upon the register of actions,

which contained many errors and omissions.

The People were also ordered to provide copies of several computer tapes created from data collected by the Bureau of Criminal Statistics and produced by that agency.

When the discovery request was made, Jackson's attorneys were advised that the computer tapes could not be used in conjunction with each other because there was no way to combine one set of tapes limited to victim data with another set of tapes limited to defendant data. Defendant Jackson's attorneys were further advised that the data on these tapes was incomplete due to a 30% routine underreporting factor by police agencies which supplied the raw data. Moreover, before the tapes could be used, BCS was required to write a special users' manual

for each tape. When this was done, the tapes and the manuals were turned over to Jackson's attorneys for analysis. Now Jackson's attorneys have discovered the problems associated with combining the data on the computer tapes and have advised us that additional discovery may be required to solve this problem.

Not only has discovery in Jackson been difficult to accomplish, it also has been inordinately time-consuming. Although the order establishing race and gender discrimination as issues to be addressed at the reference hearing was filed on May 3, 1984, the discovery motion in Jackson was not filed until January 1985. Because the People firmly believed (and still do) that the discovery request by Jackson's attorneys far exceeded the bounds of law and reason, the motion for discovery was intensively litigated.

As might be expected from a case of this importance and magnitude, once the initial order granting discovery was made on June 26, 1985,[6/] defendants in other death penalty cases throughout this state followed suit with similar discovery requests. Thus, throughout the state, in numerous cases, at various stages of their litigation, defendants filed such discovery motions.

C. Conclusions to be Drawn from the Jackson Case's Discovery Process

Several troubling conclusions stand out as a result of the discovery process in Jackson. (1) Most of the data is a matter of public record and could have

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6. The referee's first order of discovery was filed on June 26, 1985. However, at the People's request, this order was reconsidered. Subsequent litigation resulted in the California Supreme Court's order largely affirming the referee on March 20, 1986.

been obtained much earlier by Jackson's attorneys. (2) The time thus wasted, together with the time spent litigating discovery, has contributed to the inordinate delay of the resolution of the issues pending in this case. (3) The qualified success by Jackson's attorneys of obtaining discovery in this case has spawned virtually identical albeit specious discovery motions in numerous other death penalty cases throughout this state. Thus, unnecessary litigation has been created for the system. (4) The discovery process in Jackson, which is not yet concluded, has been very expensive when one considers all of the Clerks' offices (58 of them) as well as the many persons involved in this effort. (5) The product of this discovery is highly questionable. The data from the Clerks' offices contains no information on race or

gender. The data is, thus, useless by itself. It must be collated with other data--race/gender of defendant, race of victim--before it will have even marginal utility. (6) The quality of even this limited data is suspect. Amici's experience with this case leads to the conclusion that substantial error may be present in the Clerks' data. This, together with the acknowledged 30% under-reporting error in BCS data, suggests that any statistical analysis of even this very limited data will be useless because conclusions obtained from such data will be invalid as a matter of law. (7) Finally, even if the data obtained through this discovery process included race and gender information, and even if the data was accurate and, thus, of high quality, petitioner Jackson in California, like petitioner Hitchcock in Florida, could not

prove that which they seek to prove--that race and gender are factors influencing juries and judges in making decisions in capital cases.

If the process of discovery promised something of value it might be justifiable, but as demonstrated in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) petition for writ of cert. granted July 7, 1986 (54 U.S.L.W. 3866), statistical methods are inadequate for grappling with the factual and legal issues presented. While the hearing in McCleskey was itself grimly extensive, the one still hovering in Jackson is institutionally frightening. No such burdens should be born by our judicial system on the strength of such generalized claims as are presented here. Smith v. Balcom, 660 F.2d 573 (5th Cir. 1981) as modified 671 F.2d 858, 860 (5th Cir. 1982); Shaw v. Martin, 733 F.2d 304,

311-313 (4th Cir. 1984); Spinkellink v. Wainwright, 578 F.2d 582, 612-614 (5th Cir. 1978); McCorquodale v. Balcom, 705 F.2d 1553, 1556 (11th Cir. 1983); Stephens v. Kemp, 464 U.S. 1027, 1030, fn. 2 (1983) (Powell J., dissenting).

II

PETITIONER DID NOT ASSERT A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WITH HIS CLAIM THAT SOME GENERALIZED ARBITRARINESS HAS RESULTED FROM THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING SYSTEM

In his petition for writ of habeas corpus, petitioner claimed that Florida's death sentencing system violates the Eighth and Fourteenth Amendments because it results in the death penalty being applied in Florida in an arbitrary, capricious and irrational manner. Petitioner's attack is on the system itself and on the system as a whole. He makes no assertion

the alleged arbitrariness is intentional or that he personally was subjected to invidious discrimination in his sentencing, or that, under the facts in his case, that his death sentence is in any other respect cruel and unusual punishment. Amici curiae urge that, in a state with a facially valid capital sentencing system, such non-individualized disparate impact claims as petitioner's should be foreclosed as not asserting a violation of petitioner's constitutional rights. See Procunier v. Atchley, 400 U.S. 446, 451 (1971); Townsend v. Sain, 372 U.S. 293, 312 (1963); also Spinkellink v. Wainwright, supra, 578 F.2d at 613-614.

A. States Are Entitled to a Death Penalty If Their Capital Sentencing Systems Are Properly Balanced

It is now beyond question that states are constitutionally permitted to select the punishment of death for the crime of

murder. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

However, in recognition of the unique nature of the punishment, a state's capital-sentencing system must accommodate both a sensitivity to the uniqueness of each defendant and case and a concern for consistent application of the sentence. These "twin objectives" exist in a state of balanced tension and the Court's decisions make it clear that maintaining the balance is the key to the constitutional validity of the death penalty. Eddings v. Oklahoma, 455 U.S. 104, 110-111 (1982).

To provide "measured, consistent application," a state's capital-sentencing system must itself "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"

(the particular concern expressed by the Court in Furman v. Georgia, 408 U.S. 238 (1972)) by means of a "carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Eddings v. Oklahoma, supra, at 111; Gregg v. Georgia, supra at 189, 195. The system must thus be able to "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

In addition, to provide what the Court has called "fairness to the accused," the sentencing authority must take into account "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v.

Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, supra, at 111, 113-114. This requirement necessarily dictates that the sentencing authority be given discretion to decide the penalty of death, on the basis of all the facts presented to it. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

Thus, the Constitution requires that the sentencing authority's discretion be limited enough to provide some consistency, but yet be kept abroad enough to properly bring the subjective conscience of the community to bear on the unique circumstances of each case. Once a state has provided for these delicately balanced concerns, the state is permitted under the Constitution to select death as a penalty for the crime of murder.

B. The Issue of the Constitutionality of Florida's Capital Sentencing System Has Been Settled

No less than three times the Court has concluded that Florida's capital-sentencing system has successfully "struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily." Spaziano v. Florida, supra, 468 U.S. at 464-465; Barclay v. Florida, 463 U.S. 939, 952-958, 958-967 (1983); Proffitt v. Florida, supra, 428 U.S. 222, 252-253, 260-261. Nevertheless, the petitioner claims Florida's capital-sentencing system itself is unconstitutional because, as applied, it results in some arbitrariness.

We are a nation of laws implemented by humans incapable (and undesirous) of machine-like consistency. A capital-sentencing system cannot be statistically

programmed to spew out the appropriate sentence for each defendant convicted for a capital crime. To do so would be to eliminate the judge and jury from the process. Clearly, we have no choice but to rely on humans. If the thousands of judges and jurors who sit on this country's capital cases are, as a class, biased, then the tens of thousands of judges and jurors who sit on other criminal cases are biased. No guilt or penalty decision in any criminal case would be free of that bias. No properly constituted jury could ever be impaneled. As noted by Justice White in his concurring opinion in Gregg v. Georgia, supra, at 226:

> "Petitioner has argued, in effect, that no matter how effective the death penalty may be as punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be

accepted as a proposition of constitutional law."

When crimes are committed, society must protect itself by punishing the wrongdoers. Certainly petitioner's claim could not have been taken seriously if he had asserted that Florida's entire criminal sentencing system, non-capital as well as capital, was unconstitutional because of some arbitrariness in its application and therefore that all resulting sentences and sanctions should be stricken. His claim is not made more tenable by limiting his assault only to death sentences. To be sure, the penalty of death is fundamentally different from the penalty of imprisonment, but a state satisfies the constitutional imperative of that difference by establishing a capital-sentencing system which meets the standards of Gregg and Lockett and their progeny. Once those standards are met, as

they are here, petitioner's claim has no greater power than it would in a simple burglary case.

In Furman v. Georgia, supra, 408 U.S. 238, the Court addressed with great difficulty a generalized claim of arbitrariness in the imposition of the death penalty. Since then the court has labored hard "to provide standards for a constitutional death penalty" which would remedy the arbitrariness condemned in Furman and obviate the need to address generalized claims of such arbitrariness. See Eddings v. Oklahoma, supra, at 111. For the Court to once again entertain these generalized attacks would be to cast aside not only the Court's labor of the last ten years but also that of the States which have endeavored to meet the Court's standards. Having met these standards, Florida should not be put to the task of having to

repeatedly defend its capital sentencing system against generalized claims of disparate impact.

We urge that a state capital sentencing system which meets the guidelines of the Court's post-Furman cases is presumptively free of the generalized arbitrariness condemned in Furman. See Spinkellink v. Wainwright, supra, 578 F.2d 582, 599-606, 613-614. As noted by Justice Powell, who was joined by Chief Justice Burger and Justices Rehnquist and O'Connor, in a dissent from the grant of a stay in Stephens v. Kemp, 464 U.S. 1027, 1030-1031 fn. 2 (1983):

> "Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman v. Georgia, 408 U.S. 238 (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg v. Georgia, 428 U.S. 153 (1976)."

C. Florida Cannot Fashion A "More" Constitutional System Than The One It Has

To strike Florida's capital-sentencing system as unconstitutional on a generalized claim of arbitrariness would in effect deprive the State of Florida from ever having a capital-sentencing system. Any subsequent legislative efforts to further "minimize the risk of wholly arbitrary and capricious action" beyond the present constitutional system's attempts would invariably run afoul of the other objective required in a capital-sentencing system, i.e., a sensitivity to the uniqueness of the individual. The delicate balance required by the Court would inevitably be disrupted. See Eddings v. Oklahoma, supra, 455 U.S. at 110-111. The only cure for the arbitrariness petitioner alleges would be to reduce the amount of discretion available to the

sentencing authority. This, however, would result in nearly mandatory death sentences which are as constitutionally prohibited as are wholly unguided ones. Id. at 111-112; Baldwin v. Alabama, ___ U.S. ___, ___; 86 L.Ed.2d 300, 307-308 (1985); Woodson v. North Carolina, supra, 428 U.S. 280, 301-305 (1976); Roberts v. Louisiana, supra, 428 U.S. 325, 331-336 (1976). Since Florida cannot fashion a "more" constitutional system than the one it has, the choice is either the current system or none at all.

Although the risk of arbitrary and capricious action can be minimized by a capital-sentencing scheme, the risk cannot be fully eliminated in a system which also must provide discretion for the sentencing authority to consider the circumstances of the offense and the defendant's character or record before imposing a death

sentence. An inevitable by-product of this latter requirement is that in the course of exercising the discretion necessary to comply with it, the state's sentencing authorities may render apparently inconsistent decisions. This is inherent in the balance struck by the Court's post-Furman cases and, of course, does not necessarily reflect arbitrariness or capriciousness. Turner v. Murray, ___ U.S. ___, ___; 90 L.Ed.2d 27, 35-36 (1986). As the Court has recognized:

> "Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."' [Citations omitted.]" Pulley v. Harris, supra, 465 U.S. at 54.

D. **Both A Claim of Arbitrary Action in Petitioner's Own Case and A Claim That the Alleged Arbitrary Action Has An Invidious Discriminatory Purpose Should Be Required**

None of the above discussion is meant to suggest that arbitrary action in the imposition of the death penalty is condoned. It is not. However, for the reasons indicated above, claims of arbitrary action under a system which is constitutional as drafted and interpreted should be required to focus on the individual cases in which the arbitrariness is alleged to have occurred and should be directed to individual sentences, not to the system as a whole.[7/]

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7. Of course, if the claims of arbitrariness are founded in an assertion that the capital-sentencing system is invalid because of the way it has been drafted or interpreted, those claims will always be entertained. See Godfrey v. Georgia, 446 U.S. 420 (1980).

Also, in some instances evidence as to how the system is operating as a whole may

See Caldwell v. Mississippi, 472 U.S. ___, ___; 86 L.Ed.2d 231 (1985). Petitioner should have to show why his death sentence is cruel and unusual punishment for the crime he committed. See Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

Additionally, where the alleged arbitrariness suggests unlawful discrimination on the part of the state, the claims must include an assertion of invidious discriminatory purpose.

Allegations of invidious discriminatory purpose have long been required in claims of unlawful discrimination under the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky,

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be relevant to the ultimate determination of whether there was unlawful action in the individual case. The focus of the claim, however, would remain on the individual case. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-266 (1977); Alexander v. Louisiana, 405 U.S. 625, 630-632 (1971).

___ U.S. ___, ___; 90 L.Ed.2d 69, 80-82 (1986); Memphis v. Greene, 451 U.S. 100, 119 (1981); Arlington Heights v. Metropolitan Housing, supra, 429 U.S. at 265. Similarly, where a due process claim under the Fifth Amendment has been deemed to contain an equal protection component, there is a requirement of an "invidious discriminatory purpose" allegation. Wayte v. United States, 470 U.S. ___, ___; 84 L.Ed.2d 547, 556 fn. 9 (1985).

It follows, therefore, that to the extent cruel and unusual punishment claims under the Eighth Amendment contain an equal protection concern that the death penalty not be imposed discriminatorily, they also must include an assertion of invidious discriminatory purpose to be cognizable. The basic thrust of the claims are the same: governmental action

has resulted in invidiously discriminatory impact.

E. Conclusion

On its face, petitioner's sentence of death is neither arbitrary nor capricious. Neither is the system under which petitioner was sentenced to death. Since petitioner made no claim that in his own case the death penalty was purposely applied in an invidiously discriminatory manner on him, he did not fashion a claim which asserted a violation of his constitutional rights, and the District Court properly denied petitioner's request for an evidentiary hearing. See Procunier v. Atchley, supra, 400 U.S. at 451; Townsend v. Sain, supra, 372 U.S. at 312.

III

EVEN IF PETITIONER ASSERTED A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, HE DID NOT ALLEGE FACTS WHICH IF PROVED WOULD SUPPORT HIS CLAIM

Petitioner's claim is directed at Florida's entire capital-sentencing system itself. If a hearing on that claim was not foreclosed for the reasons previously set forth, petitioner was still required to allege facts in support of his claim which, if proved, would have entitled him to the relief sought. See Procunier v. Atchley, supra; Townsend v. Sain, supra. Petitioner's showing in this regard was inadequate as a matter of law.

The sole proffered factual support for petitioner's claim consisted of general statistics. Asserted in his petition for writ of habeas corpus were statistics, among others, that ". . . Orange County sentences to death 54.2% of

the persons convicted of first degree murder in which a felony is involved, compared to 32.0% in other metropolitan areas. . . . [O]nly 1.6% of women indicted for first degree murder received the death penalty . . . compared to 12.4% of men indicated for first degree murder. . . . Among persons indicted for first degree murder, 11% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs. . . . Of those persons . . . charged with the murder of a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with the murder of a black victim. . . ."

In addition to his initial proffer, petitioner filed a tentative draft of a study by Professors Gross and Mauro "as a supplemental appendix 'to show a prima

facie basis for [his] claim . . . and for discovery concerning the issue.' R111. The study has since been published as Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.Rev. 27 (Nov. 1984)." See Petitioner's Brief on the Merits, p. 52 fn. 58. The statistically-based conclusion of Professors Gross and Mauro presented to the District Court was that "[i]n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim." Gross & Mauro, supra, at 78-79.

It is evident that all petitioner offered in support of his request for an evidentiary hearing were superficial disparities in the rates the death penalty is imposed. He assumes, and would have

had the District Court assume, that those disparities reflect arbitrariness in the imposition of death sentences in Florida. This is an unfounded assumption.

There may be a "disparity," for example, between the percent of women indicted for murder who receive death sentences when compared to the percent of men indicted for murder who receive death sentences. However, this "disparity" would hardly be a reflection of arbitrariness if it were merely a reflection of the qualitatively and quantitatively different ways in which men and women kill. The disparity itself does not shed light on whether it is an arbitrary one. Likewise, the other reported inconsistencies no more support petitioner's conclusion of arbitrariness in the imposition of death sentences in Florida than other more constitutionally acceptable conclusions

that Orange County is the hapless host of more than its share of Florida's worst murders, that persons better off in a socio-economic sense are more likely than poorer persons to be targets of capital eligible type murders such as killings in the perpetration of a robbery or burglary, and that white persons are generally more likely than black persons to be the targets of these types of murders. Petitioner's reported statistical disparities have no probative value in and of themselves.

Another way to look at the inadequacies of the disparities presented by petitioner is the irrelevancy of their comparisons. They are as "meaningless" as the racial-composition percentage comparisons rejected by the Court in Mayor v. Educational Equality League, 415 U.S. 605, 620-621 (1974) for not being comparisons

of persons in similar positions. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Hazelwood School District v. United States, 433 U.S. 299, 308 fn. 13 (1977).

In the context of the instant case, there are particularly special qualifications required of persons who kill to make them eligible for a death sentence. Not only do they have to be arrested, charged, and found guilty beyond a reasonable doubt of first degree murder, they also must be associated with at least one statutory aggravating circumstance. See §§ 782.04(1), 921.141(5)(6), Fla. Stats. (1985). All of petitioner's comparisons are to a considerably more general

population of killers than this narrow category.

Petitioner compares the death sentence group to groups in which the killers were only suspected of committing a homicide,[8] or only charged with murder, or only convicted of first degree murder, or only convicted of first degree murder when some other type of felony was also involved.[9] However, not all homicides, not all indictments for murder, not all convictions for first degree murder, and not even all convictions for first degree murder involving another felony, will result in the findings required to qualify a defendant for consideration of imposition of the death penalty. See §§ 782.04, § 921.141 (5), (6), Fla. Stats.

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8. Gross & Mauro, supra, at 49.

9. Pet. for Writ of Habeas Corpus at 57-58, ¶¶ G(2)(a), (b), (c), (d).

(1985) [e.g., neither a first degree murder which is merely a premeditated killing nor a first degree murder perpetrated in the course of felonies other than the ones listed make a person eligible for the death penalty.]

Petitioner apparently assumes that capital-eligible killings are equally distributed between white victims and black victims and equally distributed in cases involving murder indictments and convictions. He assumes, for example, that women indicted for first degree murder have committed capital-eligible killings (including killings in the course of robberies, burglaries and rapes) at the same rate that men indicted for first degree murder have committed such killings. As any student of this country's criminal justice system knows, in the words of the Fifth Circuit, "No

conclusions of evidentiary value can be predicated upon such unsupported assumptions." Smith v. Balkcom, supra, 671 F.2d at 860 fn. 33.

In implied recognition of this flaw in his presentation, petitioner relies heavily on Gross and Mauro's efforts to determine whether non-racial factors might explain the race-of-victim disparity. Gross and Mauro conclude that they do not. Their conclusions, however, like petitioner's are based on unwarranted assumptions. Gross and Mauro, supra, at 66.

The Gross and Mauro study itself undermines the assumption that capital-eligible killings are equally distributed between white and black victims. Reworking the figures given in Gross and Mauro's Tables 1 and 4 to determine whether white persons are more likely than black persons to be victims of killings

involving the commission of a separate felony, it reveals that they overwhelmingly are.[10/] Of all the homicides in Florida involving either a black or a white victim (3,486), 51.7% (1,803/3,486) were white and 48.3% (1,683/3,486) were black. However of the homicides reported by petitioner to also involve the commission of a separate felony (474), 73.0% (346/474) of the victims were white but only 27.0% (128/474) of the victims were black. Although the perpetration of a killing in

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10. Homicides involving the commission of a separate felony do not necessarily result in capital-eligible convictions since, among other things, killings in the commission of only a select few felonies could ever result in capital-eligible convictions. However, amici curiae will indulge in petitioner's assumption, for this example only, that petitioner's figures for the number of homicides involving the commission of a separate felony include at least some of the killings which eventually result in capital-eligible convictions.

the course of some felonies constitutes the commission of a capital-eligible offense, any assumption that capital-eligible killings are equally distributed between white victims and black victims is likely to be as unfounded as the assumption that killings involving the commission of a separate felony are equally distributed between white victims and black victims.[11/] Id., at 55, 57.

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11. Although Gross and Mauro acknowledge that there might be variables which were omitted from their data which could explain the racial disparities on nonracial grounds, they then plead unawareness of any such variable. One critical sentencing variable which was omitted from their consideration was the type of felony involved in the homicide convictions. As repeatedly stated herein, it is the commission of only a few felonies, such as robbery, burglary, rape, etc., which can elevate a homicide to a capital-eligible murder. At the time of Gross and Mauro's study, a killing in the course of a felony drug sale did not necessarily constitute a capital-eligible murder. Neither did a killing occurring at the same time as another, but non-fatal felony aggravated assasult. Given the

Another reason that petitioner's reported disparities do not support his conclusion that Florida's capital-sentencing system is applied arbitrarily is that petitioner presented material to the District Court which conflicts with that conclusion. Specifically, petitioner presented the Gross and Mauro study which found that the race of the suspect did not significantly affect capital-sentencing decisions in Florida. Id. at 82.

The theory underlying petitioner's claim is that race discrimination "has continued to inform the decision to impose the death sentence for homicide in Florida. . . ." Pet. Brief on Merits

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differences in the rates in which blacks and whites are victims of homicides involving all types of separate felonies, it is plausible to hypothesize that there are substantial differences in the rates in which the two groups are victims of capital-eligible murder. See id. at 99-102.

at 48. He asserts that the reported race-of-victim disparities in the imposition of the death penalty in Florida reflect "the continuing effects" of "official approval of and tolerance for violence against black people." Id. at 72, 73.

If the State of Florida's prosecutors, judges, and jurors are so racist that they are deciding who lives and who dies on the basis of race, it is inconceivable that this racism would operate only when the race of the victim is being considered and not operate when the race of the accused is being considered. It is even more incredible to speculate that this purported victim-based racism would still operate when the accused and the victim are both of the same race, as in petitioner's case.

Thus, petitioner's factual allegations clearly do not support his

conclusion that Florida's capital-sentencing system is arbitrarily applied. He was not entitled to a hearing on that conclusion.

CONCLUSION

The instant case presents the question whether the District Court erred in determining that petitioner did not proffer sufficient evidence to entitle him to a hearing on the discrimination issues. We submit the District Court was correct: petitioner's factual and legal arguments in support of his claim are without merit. The granting of a hearing on the basis of this evidence will lead ineluctably into a vast swamp of statistical data which can not be used to prove his contentions.

Petitioner's challenge is at heart a charge that the judicial system does not work. As Justice White stated in Gregg, "This cannot be accepted as a proposition

of constitutional law." Gregg v. Georgia, supra, 428 U.S. at 226 (White, J., concurring).

For the reasons set forth above, the order of the District Court should be affirmed.

Respectfully submitted,

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